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SC Court of Appeals

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 0715651

DONNIE LOWE,

EMPLOYEE,
CLAIMANT/APPELLANT,

V.

BMW MANUFACTURING CORPORATION

EMPLOYER,

AND

HARTFORD INS. CO. OF THE MIDWEST,
C/O SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,

CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in
Columbia, South Carolina on October 17, 2016.

Appellate Panel Decision and Order
filed February 23, 2017.

APPEARANCES:

Claimant/Respondent represented by
Mitchell Byrd, Esquire, of The Carolina Law Group
of Greenville, South Carolina.

Defendants/Appellants represented by
Brad B. Easterling, Esquire, of McAngus Goudelock & Courie, L.L.C.
of Greenville, South Carolina.

STATEMENT OF THE CASE

This matter came to be heard before the Single Commissioner on December 10, 2015 in Greenville, South Carolina. Claimant asserted he sustained a change of condition for the worse under section 42-17-90 of the South Carolina Code. Claimant alleged that as a result of this injury, he is entitled to additional medical examination and treatment for his back and right lower extremity. On the other hand, Defendants asserted that Claimant's claim for a physical change of condition is procedurally barred because it was not filed within one year of the date of last payment of compensation as required by section 42-17-90(A). Defendants further asserted that even if the claim was timely filed, Claimant has failed to meet his burden of proving a physical change of condition for the worse.

EVIDENCE OF THE CASE

On October 2, 2007, Donnie K. Lowe (Claimant) suffered an admitted injury to his spine. He reached maximum medical improvement for this injury on January 6, 2011. The Honorable T. Scott Beck heard this case on May 9, 2012, and filed a Decision and Order on August 28, 2012. (Claimant's Ex. #1; Def. Ex. #1). Commissioner Beck awarded Claimant 35% permanent partial disability (PPD) to his spine along with future causally-related medical care per Dr. James Behr's recommendation. On October 3, 2012, Defendants paid Claimant \$65,239.95 representing 105 weeks of PPD pursuant to Commissioner Beck's Order. (Def. Ex. #4)

On July 3, 2013, Claimant filed a Form 50 Request for Hearing, alleging a change of condition for the worse. (Def. Ex. #3). Claimant included a questionnaire from Dr. James Behr, the authorized treating physician, indicating Claimant had suffered a physical change of condition for the worse. On October 7, 2013 (amended per instruction of Appellate Panel), Claimant withdrew his Form 50 shortly after Defendants deposed Dr. Behr, regarding Claimant's

alleged change in condition. On or about September 3, 2015, Claimant refiled another Form 50 Request for Hearing alleging another change of condition. (Def. Ex. #2). Claimant included questionnaires from Dr. Behr and Dr. Jason Kelly in support of this allegation.

In his Order dated July 15, 2016, the Single Commissioner found that the greater weight of the evidence supports a finding that pursuant to Section 42-17-90 the Claimant's petition for a change of condition is untimely filed. Therefore, the undersigned dismissed the matter as a matter of law. On July 28, 2016, Claimant filed a Form 30, Application for Commission Review, asserting that the Single Commissioner erred concluding as a matter of law that claimant was barred from seeking review of the award on a change of condition claim as he did not properly perfect his claim pursuant to S.C. Code Section 42-17-90.

A review hearing was held before the Full Commission on October 17, 2016 where both parties presented oral arguments in support of their positions. This Order follows.

The Single Commissioner made the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Under South Carolina Code Section 42-17-90(A), a review for a change of condition must be made within "[12] months from the date of the last payment of compensation pursuant to an award provided by this title."
2. Under South Carolina Code Regulation 67-609(A), "[a] claimant may withdraw a Form 50 . . . once as a matter of right with leave to renew."
3. The South Carolina Supreme Court has strictly construed the one-year limitation provided by section 42-17-90(A) and held that claims filed more than one year after the date of last payment of compensation are procedurally barred. *See Wallace v.*

Campbell Limestone Co., 198 S.C. 196, 203, 17 S.E.2d 309, 311-12 (1941) (finding a claim was barred under the predecessor to section 42-17-90(A) when it was filed more than one year after the last payment of compensation).

4. In *Wallace*, the claimant was awarded medical and indemnity benefits for an injury to his left leg, the last payment of which was made on June 7, 1937. *Id.* On June 15, 1940, he claimed an additional award for disfigurement. *Id.* at 198-99, 17 S.E.2d at 310. The South Carolina Supreme Court held the claimant's request for additional benefits was untimely because it was filed more than three years after the date of last payment of compensation. The Court cited the predecessor to section 42-17-90, which provided identical language as the current language of section 42-17-90, noting "no such review shall be made after twelve months from the date of the last payment of compensation" The Court specifically stated, "[t]he conclusiveness of [this statute] is inescapable." *Id.* at 201, 17 S.E.2d at 311 (emphasis added). The Court further noted that "[s]uch statutes apply with full force to the most meritorious claims." *Id.* at 203, 17 S.E.2d at 311-12 (citing *Rudd v. Fairforest Finishing Co.*, 189 S.C. 188, 200 S.E.2d 727, 730 (1939) ("While we should give the Compensation Act a liberal construction, we are not justified in so construing it as to do violence to a specific requirement of the Act.")). Thus, the Supreme Court dismissed the claimant's request for additional benefits because it was not filed within the one-year limitation provided by the predecessor to section 42-17-90.
5. Here, Defendants paid Claimant \$65,239.95 on October 3, 2012, representing 105 weeks of permanent partial disability pursuant to Commissioner Beck's Order.

6. Under the one-year limitation prescribed by section 42-17-90(A), Claimant had to file a review for a change of condition within twelve months "from the date of last payment of compensation" or October 3, 2013.
7. Claimant's Form 50 was timely filed, however was withdrawn.
8. Claimant refiled his Form 50 on September 3, 2015.
9. Although Claimant has leave to refile the Form 50 pursuant to Regulation 67-609, Claimant did not do so within the legal time limitation prescribed by section 42-17-90.
10. Claimant's Form 50 was not refiled until after the legal time limitation pursuant to Section 42-17-90 had expired.
11. Therefore, because a Regulation cannot be construed to expand the time limitation provided by statute, Claimant is barred as a matter of law from pursuing review of the award on a change of condition. *See Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute.").

CONCLUSIONS OF LAW

1. South Carolina Code Section 42-17-90(A) provides that a review for a change of condition must be made within "[12] months from the date of the last payment of compensation pursuant to an award provided by this title."
2. Although Claimant has leave to refile the Form 50 pursuant to Regulation 67-609, Claimant did not do so within the legal time limitation prescribed by section 42-17-90.

3. Therefore, because a Regulation cannot be construed to expand the time limitation provided by statute, Claimant is barred as a matter of law from pursuing review of the award on a change of condition.

ORDER

IT IS HEREBY ORDERED that the greater weight of the evidence supports a finding that pursuant to Section 42-17-90, Claimant's petition for a change of condition was untimely filed. Therefore, the undersigned dismisses this claim as a matter of law.


AND IT IS SO ORDERED.

ORDER OF APPELLATE PANEL

IT IS HEREBY ORDERED, that the greater weight of the evidence and testimony supports a conclusion that the Order of the Single Commissioner shall be Affirmed with amendment. Said amendment to correct the scrivener's error that claimant withdrew his Form 50, Request for Hearing for Change of Condition, on October 7, 2013, not August 7, 2013.

IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION


Melody James, Commissioner


Susan S. Barden, Commissioner


Aisha Taylor, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on February 24, 2017